

1 KAREN A. OVERSTREET
Chief Bankruptcy Judge
2 United States Courthouse
700 Stewart St., Suite 6310
3 Seattle, WA 98101
206-370-5330
4

5 UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 In re)
) Chapter 7
8 CATHERINE DIANE WISEMAN,)
)
9 Debtor.)
) Bankruptcy No. 07-10976
10)
11)
12 UNITED STATES TRUSTEE,)
) Adversary No. 07-1158
13 Plaintiff,)
14 V.)
15) **MEMORANDUM DECISION**
16 CATHERINE DIANE WISEMAN,)
) **NOT FOR PUBLICATION**
17)
18 Defendant.)

19 This matter came before me for trial on June 10, 2008. After
20 hearing the evidence and oral argument I took the matter under
21 advisement so that I could review more carefully the exhibits
22 admitted at trial. This Memorandum Decision contains my findings
23 of fact and conclusions of law for purposes of Bankruptcy Rule
24 7052. I have jurisdiction of this matter pursuant to 28 U.S.C.

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MEMORANDUM DECISION - 1

1 §§ 157 and 1334 and this is a core proceeding under 28 U.S.C. §
2 157(b)(2)(I).¹

3 For the following reasons, I find that the discharge of the
4 defendant, Diane Wiseman ("Defendant"), should be denied pursuant
5 to §§ 727(a)(2), 727(a)(3)(A), 727(a)(4) and 727(a)(5)(A).

6 **I. Summary of Action**

7 The United States Trustee ("UST") seeks to deny Defendant's
8 discharge pursuant to (a) 11 U.S.C. § 727(a)(2) for the concealment
9 and/or transfer of assets with intent to hinder, delay, or defraud
10 a creditor or the chapter 7 trustee; (b) 11 U.S.C. § 727(a)(3)(A)
11 for concealing, destroying, or failing to keep or preserve recorded
12 information; (c) 11 U.S.C. § 727(a)(4) for knowing and fraudulent
13 false oaths relating to material facts that were made in or in
14 connection with the chapter 7 case; (d) 11 U.S.C. § 727(a)(5)(A)
15 for failing to account for substantial funds; and (e) 11 U.S.C.
16 §727(a)(6)(A) for refusing to obey a lawful order of this Court.

17 The Defendant asserts the affirmative defense that she was
18 clinically depressed at the time the schedules and statements were
19 prepared and signed and consequently was incapable of forming any
20 intent to hinder, delay or defraud creditors or the trustee. She
21 also contends that she relied on attorneys whom she had known, both
22 personally and professionally, for more than 20 years, and who had
23 represented her in all of her legal affairs. She argued at trial
24 that she had a right to rely on their knowledge of her legal

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¹ Unless otherwise indicated, all Code, Chapter, Section and
27 Rule references are to the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*
28 and to the Federal Rules of Bankruptcy Procedure [Interim], Rules
1001 *et seq.*

1 affairs, especially given the long personal and attorney client
2 relationship.

3 **II. Findings of Fact²**

4 On March 8, 2007 (the "Petition Date"), the Defendant filed a
5 voluntary chapter 7 petition (the "Petition") in the Western
6 District of Washington, case no. 07-10976 (the "Chapter
7 7 Case"). The trustee in the Chapter 7 Case is Edmund Wood (the
8 "Trustee"). In conjunction with the Chapter 7 Case, the Defendant
9 filed schedules of assets and liabilities (each an "Initial
10 Schedule" and collectively, the "Initial Schedules") and a
11 statement of financial affairs (the "Initial SOFA"). The Defendant
12 signed the Petition, Initial Schedules, and Initial SOFA under
13 penalty of perjury as being true and correct.

14 On the Petition Date, the Defendant's Key Bank checking
15 account balance was approximately \$6,100 (the "Petition Date
16 Funds"). Initial Schedule B states that the total amount of money
17 in Defendant's checking accounts on the Petition Date was \$100.
18 Defendant testified that she believed that a number of checks were
19 written on the account prepetition but cleared the checking account
20 postpetition.

21 On the Petition Date, the Defendant had an interest in jewelry
22 (the "Jewelry") including a ring with a diamond solitaire (the
23 "Ring"). The purchase price for the ring was less than \$5,000.
24 Defendant obtained an appraisal that valued the Ring at \$1,000.
25 Pursuant to an order of the Court, Defendant turned the ring over
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27 ² Most of the following factual findings come directly from
28 the admitted facts in the parties' pretrial order at Docket No. 29.

1 to the Trustee. On Initial Schedule B, Defendant marked "None" in
2 response to whether she had an interest in jewelry. She contends
3 that the Ring was disclosed as part of the \$5,000 of "Home
4 Furnishings" listed on Line 4 of Initial Schedule B.

5 On or about January 1, 2000, the Defendant, her husband Jim
6 Wiseman, and the Defendant's company Exceptional Escrow Corporation
7 ("Seller") entered into an Asset Purchase Agreement ("Sale
8 Contract") with Ocean Shores Escrow, Inc./Northbeach Exchange
9 Corporation (the "Buyer") and Douglas Tyler and Catherine Tyler
10 ("Buyer's Shareholders"). Under the Sale Contract, the Buyer
11 agreed to pay the Seller \$15,000 for certain assets. The Buyer
12 also agreed to pay the Defendant and Jim Wiseman \$345,000 to enter
13 into non-competition agreements. In conjunction with the Sale
14 Contract, the Buyer signed a promissory note payable to the Seller,
15 the Defendant, and Jim Wiseman in the sum of \$360,000 (the "Account
16 Receivable"). All of the Buyer's obligations were personally
17 guaranteed by each of the Buyer's Shareholders. Although some
18 interest-only payments were made on the Account Receivable for
19 approximately one year, thereafter the Buyer defaulted on its
20 payment obligations. The Account Receivable was never paid by the
21 Buyer, or by the Buyer's Shareholders under their personal
22 guarantees. One of the Buyer's Shareholders, Douglas Tyler,
23 received a chapter 7 discharge on May 16, 2006, in case
24 no. 05-50911, filed in the Western District of Washington. Prior
25 to his bankruptcy filing, the Buyer's Shareholders had divorced.
26 On Initial Schedule B, the Defendant marked "None" in response to
27 whether she had an interest in any account receivable.

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1 In December 2006, a wind storm caused a tree or part of a tree
2 to damage a house owned by the Defendant located at 17807 E. Lake
3 Desire Drive S.E., Renton, WA (the "Lake House"). The Defendant
4 submitted a claim relating to the damage to Farmers Insurance (the
5 "Wind Damage Claim"). On or about January 19, 2007, as a result of
6 the Wind Damage Claim, the Defendant received a check from Farmers
7 Insurance in the amount of \$11,892.74 (the "Prepetition Insurance
8 Payment"). On March 7, 2007, the Defendant faxed a final bid for
9 repair work on the Lake House related to the Wind Damage Claim to
10 an adjuster at Farmers Insurance ("the Final Bid"). The Final Bid
11 was in the amount of \$22,687.97. Postpetition, on or about April
12 6, 2007, the Defendant received a second check from Farmers
13 Insurance relating to the Wind Damage Claim in the amount of
14 \$13,550.79 (the "Postpetition Insurance Payment"). Initial
15 Schedule B does not disclose the Defendant's entitlement or
16 expectation to receive additional funds postpetition from Farmers
17 Insurance relating to the Wind Damage Claim. The Defendant did not
18 inform the Trustee of receipt of the Postpetition Insurance
19 Payment, and did not turn the funds over to the Trustee. Instead,
20 Defendant testified that she used the funds to pay contractors who
21 had worked on the Lake House and to pay herself and her husband for
22 work they had done on the Lake House related to the wind damage.

23 On the Petition Date, the Defendant owned three horses, two of
24 which are thoroughbreds (collectively, the "Horses"). On Initial
25 Schedule B, the Defendant marked "None" in response to whether she
26 had an interest in any animals. She listed \$500 in "Animal"
27 expenses on Line 17 of Initial Schedule J.

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1 The Defendant was a party to at least five lawsuits within one
2 year immediately preceding the Petition Date (collectively, the
3 "Prepetition Litigation"). The Prepetition Litigation is not
4 listed in the Initial SOFA and, in response to question number 4a
5 on the Initial SOFA, the Defendant indicated "None." Leen &
6 O'Sullivan represented the Defendant in the Prepetition Litigation.
7 According to the testimony of Defendant, Sheila O'Sullivan and
8 David Leen, of the firm of Leen & O'Sullivan had represented
9 Defendant in her legal affairs for approximately 30 years.

10 On the Petition Date, the Defendant had a legal interest in a
11 1995 Geo Prizm and a 1997 Geo Prizm (collectively, "the Vehicles").
12 Initial Schedule B does not disclose the Defendant's interest in
13 the Vehicles. Defendant testified that one Prizm belonged to her
14 son and that she merely co-signed the loan he took out to buy the
15 car. She believed he had paid the car off and her name had been
16 removed from the title. Defendant testified that the other Prizm
17 belonged to her step son and she did not realize that her husband's
18 name was still on the title to that vehicle. The Trustee has not
19 taken any action as to these vehicles as they do not appear to have
20 value for creditors.

21 The Defendant had an interest in a 45-foot Bayliner boat (the
22 "Bayliner") that was repossessed prepetition by Key Bank in
23 February 2007 or early March 2007. The repossession of the
24 Bayliner is not disclosed in the Initial SOFA and, in response to
25 question number 5 (which requires disclosure of repossessions
26 within one year of bankruptcy) on the Initial SOFA, the Defendant
27 marked "None."

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1 In August 2005, the Defendant refinanced the Lake House (the
2 "Refinance"). As part of the Refinance transaction the Defendant
3 received approximately \$42,000 in net proceeds ("Refinance
4 Proceeds") and executed a new deed of trust to Viking Bank to
5 secure the new loan. There is nothing in the Initial Schedules or
6 the Initial SOFA referring to the Refinance or receipt by the
7 Defendant of the Refinance Proceeds.

8 At the meeting of creditors held on April 12, 2007 (the
9 "Creditors' Meeting"), the Defendant testified under oath that she
10 reviewed and signed the Petition, Initial Schedules and Initial
11 SOFA; all of the information in the Petition, Initial Schedules and
12 Initial SOFA was true and correct; all of her assets and debts were
13 disclosed in the Initial Schedules and Initial SOFA; and there were
14 no errors or omissions in the Initial Schedules or Initial SOFA
15 that needed to be brought to the Trustee's attention. Although
16 Defendant's responses at the Creditors' Meeting were mostly "yes"
17 or "no" responses, I conclude from reading the Section 341
18 transcript (Ex. P-25) that Defendant understood the questions being
19 asked and her responses. The Trustee, Edmund Wood, testified at
20 trial that when he examined Defendant at the 341 meeting he had no
21 concern that she had mental problems or was unable to understand
22 the proceedings.

23 On March 17, 2007, Defendant filed a motion to convert her
24 case to a chapter 11. (07-10976; Docket No. 13). The Trustee
25 objected to the motion on the grounds that Defendant might be
26 subject to claims for fraud related to her escrow company's closing
27 of a refinancing transaction in connection with the Lake House.
28 The Trustee was also concerned that Defendant had conflicts of

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1 interest preventing her from executing her duties as a debtor in
2 possession. See Trustee's objection at Docket No. 34, 07-10976).
3 On May 3, 2007, the Defendant signed a Declaration in support of
4 her reply to the Trustee's objection to her request to convert her
5 case to a chapter 11. Ex. P-10. In that declaration, Defendant
6 attested that she was competent to testify as to the factual
7 contentions contained therein, which included contentions
8 concerning her husband's health, the refinance of the Lake House,
9 the failure of her business (Exceptional Escrow) to satisfy the Key
10 Bank Deed of Trust against that property in connection with the
11 refinance, and the circumstances of the subsequent increase in the
12 debt secured by that lien.

13 Attorney Charles A. Johnson testified he had agreed to assist
14 Defendant in filing a chapter 11 proceeding, but he was not going
15 to be available in March when the case needed to be filed. He had
16 agreed with Ms. O'Sullivan, the attorney who filed the Chapter 7
17 Case, that they could convert the case to chapter 11 upon his
18 return. Mr. Johnson met with Defendant on April 12, 2007 to
19 discuss conversion of her case to a chapter 11. He further
20 testified that at that time he found her to be competent to perform
21 the duties of a Chapter 11 debtor in possession. In fact, he
22 described her as "professional and smart". In their two hour
23 meeting he found her to be responsive to his questions and believed
24 that she understood the requirements for chapter 11. At this
25 initial meeting, Defendant did not tell Mr. Johnson about any
26 investigation being conducted by the State of Washington Department
27 of Financial Institutions. She did, however, advise Mr. Johnson of
28 this investigation during their second meeting in May of 2007,

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1 although she did not advise him that the investigation was because
2 of her alleged misdirection of trust funds from her escrow company.

3 On or about June 8, 2007, the State of Washington Department
4 of Financial Institutions, Division of Consumer Services, issued a
5 Temporary Order to Cease and Desist, no. C-07-190-07-TD01, against
6 the Defendant and her 100% owned corporation Exceptional Escrow
7 Corporation (the "Cease and Desist Order"). In conjunction with,
8 or leading up to issuance of the Cease and Desist Order, the
9 Defendant signed written statements admitting that she had
10 improperly converted to her personal use more than \$65,000 of the
11 escrow trust funds in a certain IOLTA trust account (the "Trust
12 Account Funds"). The Trust Account Funds have not been repaid.

13 There are no creditors listed in the Initial Schedules
14 relating to the Defendant's admitted conversion and use of the
15 Trust Account Funds (the "Trust Account Creditors"). Nothing in
16 the Initial Schedules or the Initial SOFA refers to or discloses
17 the Defendant's receipt or use of the Trust Account Funds. Within
18 eight years of the Petition Date, the Defendant and Jim Wiseman did
19 business as a sole proprietorship under the name "Pet Friendly"
20 (UBI: 601978195) and as a sole proprietorship under the name "Davit
21 Solutions" (UBI: 602462167). Pet Friendly and Davit Solutions are
22 not listed on the Petition as trade names used by the Defendant in
23 the last eight years. Davit Solutions is listed as a sole
24 proprietorship on Line 13 of Schedule B.

25 On June 8, 2007, the Defendant filed an amended Schedule B,
26 Schedule C, and Schedule F ("the First Amended Schedule B," "the
27 First Amended Schedule C," "the Amended Schedule F," and,
28 collectively, "the Amended Schedules"), and an amended Statement of

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1 Financial Affairs ("the Amended SOFA"). The Amended Schedules and
2 Amended SOFA disclosed and addressed in various ways the Jewelry,
3 the Account Receivable, the Wind Damage Claim, the Prepetition
4 Insurance Payment, the receivable that lead to the Postpetition
5 Insurance Payment, the Horses, the Prepetition Litigation, the
6 Bayliner repossession, the Refinance, the Refinance Proceeds, the
7 Vehicles, and formerly doing business as Davit Solutions.

8 The Amended Schedules and Amended SOFA did not disclose or
9 otherwise address the Petition Date Funds, use of the trade name
10 Pet Friendly, receipt of the Trust Account Funds, and Trust Account
11 Creditors. On November 9, 2007, the Defendant filed an amended
12 Schedule B ("the Second Amended Schedule B") and an amended
13 Schedule C ("the Second Amended Schedule C"). The Second Amended
14 Schedule B disclosed the existence of the Petition Date Funds.

15 On November 16, 2007, the Court entered an Order Directing
16 Catherine D. Wiseman and the Marital Community of Jim and Catherine
17 Wiseman to Turnover Certain Assets to the Trustee and Denying Any
18 Exemption Claims for Those Assets (the "Turnover Order"). The
19 Turnover Order required the Defendant to remit \$19,585.64 to the
20 Trustee. The Defendant has not remitted the funds required by the
21 Turnover Order. Defendant testified that she received the order,
22 but did not have funds to comply with the terms of the order. She
23 did not explain why she was lacking funds to comply with the order
24 but was able to obtain approximately \$40,000 from a relative to
25 cure the delinquency in her home mortgage.

26 The Defendant's husband, Jim Wiseman, testified that during
27 the period before and after the Petition Date the Defendant was
28 essentially in a "catatonic state" and unable to do anything other

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1 than sit in a chair clutching an afgan blanket. He further
2 testified that she was unable to work and that he feared she might
3 commit suicide. Defendant's attorneys Sheila O'Sullivan and David
4 Leen testified that in their prior dealings with Defendant over
5 many years she was usually very organized and efficient. They
6 further testified that around the Petition Date, Defendant was
7 suffering a great deal of anxiety and was not her usual self. Both
8 attorneys admitted, however, that they believed Defendant was
9 competent to understand and execute the Initial Schedules and
10 Initial SOFA. Defendant testified that she signed the Initial
11 Schedules and SOFA but did not really read them.

12 Defendant called Albert Reichert, her "life coach" and a
13 retired developmental and behavioral pediatrician, to testify as to
14 her mental condition. Dr. Reichert testified that he had known
15 Defendant from his treatment of her son beginning in May of 1988.
16 Dr. Reichert retired from his practice in 2005 and since then has
17 been self-employed as a "life coach." On September 29, 2007, six
18 months after the petition was filed, Dr. Reichert interviewed
19 Defendant at her request. During the interview, Defendant related
20 to Dr. Reichert what her feelings had been over the prior six
21 months. Based upon that interview and one or more sessions
22 following September 29, 2007 (the evidence is not clear as to how
23 many sessions were held), Dr. Reichert concluded that Defendant was
24 suffering from severe depression at the time of the September
25 interview and six months earlier when Defendant was preparing for
26 and filing bankruptcy.

27 At the September 2007 interview, Defendant told Dr. Reichert
28 that at the time she filed bankruptcy she had insomnia, she was

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1 unable to think, she could not carry out daily functions such as
2 shopping, and that she was immobilized during the whole day.
3 Dr. Reichert concluded, based upon this description, that Defendant
4 met the criteria for depression. Dr. Reichert described the
5 typical symptoms of someone suffering from depression or being in a
6 "catatonic state" as including being unable to move, sitting with
7 blank stare and not in touch with their environment, suffering
8 anxiety and paranoia, and being unable to pay attention to details.
9 Dr. Reichert, however, had no personal contact with Defendant at
10 any time shortly before or after the Petition Date.

11 Prior to the Petition Date, Defendant had many things to be
12 anxious about: her personal financial situation and that of her
13 company, Exceptional Escrow, were dire, she was facing the loss of
14 her home, the Lake House had been damaged in a windstorm, her boat
15 was repossessed, and her husband was ill. Subsequent to the
16 bankruptcy filing, she faced additional stress in the closure of
17 her escrow business and investigation by the Washington State
18 Department of Financial Institutions beginning in April of 2007.
19 Defendant admitted to investigators that in 2006 she had "converted
20 to her personal use more than \$65,000 of the escrow trust
21 funds...." Ex. P-15, ¶ 1.9. The investigation led to the issuance
22 of the Cease and Desist Order, which required Defendant to
23 immediately shut down her escrow business and prevented her from
24 disbursing any of the company's funds. Ex. P-15. In June of 2007,
25 Defendant admitted in writing that she removed funds that did not
26 belong to her from a company trust account. Ex. P-16. At trial
27 Defendant testified that she had used the funds to pay expenses of
28 Exceptional Escrow, but she provided no documentation to

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1 substantiate that testimony. She claimed she was unable to obtain
2 documentation concerning the use of the funds because all of her
3 company records are under the control of the Washington State
4 Department of Financial Institutions. She offered no evidence that
5 she requested the records she needed from the department.

6 Defendant was very emotional at trial, weeping through most of
7 her testimony and during the testimony of the other witnesses.
8 Mr. Wiseman testified that Defendant's condition had improved as of
9 the time of the trial and that she was functioning well on her new
10 job.

11 **III. Conclusions of Law**

12 Based upon the foregoing findings of fact, the Court makes the
13 following conclusions of law.

14 **A. Burden of Proof.**

15 The UST has the burden of proving the elements of a cause of
16 action for nondischarge by a preponderance of the evidence. *In re*
17 *Lawler*, 141 B.R. 425, 429 (Bankr. 9th Cir. 1992). Injury to
18 creditors is not a prerequisite to denying a discharge in
19 bankruptcy. *In re Bernard*, 96 F.3d at 1282; *First Beverly Bank v.*
20 *Adeeb (In re Adeeb)*, 787 F.2d 1339, 1343(9th Cir. 1986). In
21 addition, a debtor cannot escape denial of discharge by asserting
22 that omitted information concerned a worthless business
23 relationship or holding. *Job v. Calder (In re Calder)*, 907 F.2d
24 953, 955 (10th Cir. 1990).

25 Objections to discharge are liberally construed in favor of
26 the debtor and strictly against the objecting party. *In re*
27 *Bernard*, 96 F.3d 1279, 1281 (9th Cir. 1996). Despite this
28

1 construction, the bankruptcy discharge is equitable in nature and
2 is intended only for honest debtors. *Id.*; *Adeeb*, 787 F.2d at 1345.

3 B. Reliance on Advice of Counsel.

4 As to the causes of action below which require the UST to
5 prove unlawful intent on Defendant's part, Defendant contends that
6 she relied on counsel and therefore could not have formed the
7 requisite intent. Both parties acknowledge the general rule that
8 while a debtor's reliance on the advice of her attorney may be used
9 to prove the debtor lacked the requisite intent, the debtor's
10 reliance must be in good faith. *Adeeb*, 787 F.2d at 1343. In
11 *Adeeb*, the court denied the defense of reliance of counsel where it
12 found that the debtor intended to hinder his creditors when he made
13 certain prepetition transfers. The court held "Such a finding
14 precludes the defense of good faith reliance on the advice of an
15 attorney even if the client is otherwise innocent of any improper
16 purpose. A debtor who knowingly acts to hinder or delay his
17 creditors acts with the very intent penalized by section
18 727(a)(2)(A)." *Id.* at 1343.

19 C. Denial of Discharge Under Section 727(a)(2).

20 The UST contends that Defendant's discharge should be denied
21 pursuant to Section 727(a)(2) because Defendant had the intent to
22 hinder, delay, or defraud her creditors or the Trustee when she
23 concealed: (1) the Petition Date Funds, (2) the Jewelry, (3) her
24 interest in the Vehicles, (4) her interest in the Account
25 Receivable, (5) the Wind Damage Claim, (6) the receipt of the
26 Prepetition Insurance Payment, (7) her entitlement or expectation
27 to receipt of the Postpetition Insurance Payment, (8) her interest
28 in the Horses, (9) the Prepetition Litigation, and (10) her

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1 embezzlement of the Trust Account Funds. There is no dispute that
2 items (1) through (10) were not disclosed by Defendant in the
3 Initial Schedules and Initial SOFA. The Jewelry, the Wind Damage
4 Claim, and the Horses were disclosed by Defendant to her attorneys;
5 however, these items were not listed or disclosed on the Initial
6 Schedules and Initial SOFA. See Ex. D-1, Attorneys' Case
7 Information Sheet.

8 To succeed under Section 727(a)(2), the UST must show that
9 "with intent to hinder, delay, or defraud a creditor or an officer
10 of the estate...." Defendant concealed property of the estate
11 within one year before the Petition Date or property of the estate
12 after the Petition Date. The existence of fraudulent intent may be
13 inferred from the circumstances surrounding the concealment.

14 Concerning the Petition Date Funds, Defendant testified that
15 she believed \$100, which she put as the account balance on her bank
16 account as of the Petition Date in the Initial Schedules, was the
17 correct balance after deducting checks she had written prepetition.
18 The evidence revealed, however, that Defendant wrote the checks
19 from that account to pay for repairs on the Lake House after the
20 Petition Date, so she knew that the balance of the account was more
21 than \$100 on the Petition Date.

22 Defendant disclosed to her attorney that she had a wedding
23 ring and was advised by her attorney that it should be listed under
24 household goods. I held otherwise, but conclude that Defendant did
25 not attempt to conceal this particular asset. Similarly, Defendant
26 disclosed the Horses to her attorney. Ms. O'Sullivan testified
27 that she most likely did not list the horses because they had no
28 value. All assets, regardless of value, must be listed on the

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1 schedules. Defendant did not reasonably rely on advice of counsel
2 when she signed the Initial Schedules without disclosing the
3 Horses; Defendant knew she had horses and the requirement in
4 Schedule B to list "Animals" is not difficult to understand.

5 Defendant testified that she did not list the Vehicles on the
6 Initial Schedules even though her name was on the title to one
7 vehicle and her husband's name was on the title to the other. As
8 to the car used by her son, Defendant testified she believed he had
9 paid off the car and removed her name from the title. Defendant
10 did not discuss these assets with her attorneys. The fact that
11 these assets may not have much value to the Trustee is not
12 determinative on the issue of concealment.

13 The Account Receivable was significant in amount, \$360,000.
14 Defendant testified that she did not disclose this amount on the
15 Initial Schedules because she believed the account was
16 uncollectible and therefore worthless. Defendant did not disclose
17 this potential asset to her attorneys. A debtor is required to
18 list all assets on the schedules, regardless of value. It was the
19 Trustee's responsibility to determine the value of the Account
20 Receivable and whether to pursue it. This asset was discovered
21 only because of efforts on the part of the UST.

22 Defendant appears to have advised her counsel of the wind
23 damage to the Lake House. Whether she advised her attorneys that
24 she had received insurance funds before the Petition Date and that
25 she was due to receive funds after the Petition Date is not clear.
26 Ms. O'Sullivan testified that she would not typically list
27 insurance proceeds of this type on the schedules because the funds
28 would belong to contractors performing the work and not to the

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1 debtor or the estate. In this case, however, Defendant testified
2 that she paid some of the insurance monies to herself and her
3 husband. In addition, although the Prepetition Insurance Payment
4 was evidenced by a check payable jointly to Defendant, her husband
5 and Countrywide (See Ex. P-17), the Postpetition Insurance Payment
6 was represented by a check payable only to Defendant and her
7 husband (*Id*). Defendant knew she would receive additional funds
8 after she filed her bankruptcy case, as she submitted the Final Bid
9 to the insurance company one day before the Petition Date. See *Id*.
10 Defendant was concerned about getting the repairs to the Lake House
11 paid notwithstanding the filing of the Chapter 7 Case. I conclude
12 that Defendant concealed the Petition Date Funds and the
13 Postpetition Insurance Payment funds so that she could pay for
14 those repairs rather than subject those funds to the custody of the
15 Trustee.

16 Defendant failed to tell her attorneys that she had converted
17 approximately \$60,000 in funds from her escrow company. It was not
18 until the Washington State Department of Financial Institutions
19 investigation revealed this conversion that Defendant admitted the
20 existence of additional creditors in her case. The embezzlement
21 was significant in that it would lead to the closure of Exceptional
22 Escrow and the inability of Defendant to successfully pursue a
23 chapter 11 case.

24 Defendant's omissions from the Initial Schedules and Initial
25 SOFA are too many and too selective to be anything other than
26 intentional. She contends instead that her compromised mental
27 state around the Petition Date was the reason she could not have
28 formed the requisite intent required under Section 727(a)(2)(A).

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1 Despite Defendant's alleged catatonic state, she, rather than her
2 husband, dealt with attorneys to prepare and file a bankruptcy
3 solely in her name. The day before the petition was filed,
4 Defendant submitted the Final Bid to the insurance company for
5 repairs to the Lake House. After the Petition Date, Defendant
6 issued and signed nine checks written on her KeyBank account
7 payable to various individuals and entities she testified were
8 working on the repairs to the Lake House. The checks, which are in
9 Ex. P-27, total \$12,057.04. Defendant met with attorney Charles
10 Johnson immediately after her 341 meeting on April 12, 2007 to
11 discuss conversion of her case to a chapter 11 and he testified
12 that she appeared competent at that meeting. In connection with
13 her request to convert the case, Defendant filed a declaration
14 attesting to her ability to meet her responsibilities in chapter
15 11. Although Dr. Reichert testified that Defendant was clinically
16 depressed on the Petition Date, he had no personal contact with her
17 during that period of time and his opinion is dependent upon the
18 truth of Defendant's statements to him six months after the
19 Petition Date concerning her condition as of the Petition Date.
20 Therefore, Dr. Reichert's opinion is not entitled to much weight on
21 the question of Defendant's mental state when she filed bankruptcy.

22 Based upon the evidence, I find that Defendant was mentally
23 competent on the Petition Date, she understood the tasks necessary
24 for preparation of her bankruptcy case, she understood that she was
25 signing the Initial Schedules and Initial SOFA under oath, she
26 failed to list significant assets on her Initial Schedules and
27 Initial SOFA and she thereby intended to hinder her creditors.

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1 D. Denial of Discharge under 727(a)(3).

2 The UST contends that Defendant's discharge should be denied
3 pursuant to Section 727(a)(3) because she concealed, destroyed, or
4 failed to keep or preserve recorded information from which her
5 financial condition or business transactions might be ascertained,
6 including, without limitation, recorded information regarding
7 disposition of the Prepetition Insurance Payment, the Postpetition
8 Insurance Payment, the Petition Date Funds, and the Trust Account
9 Funds.

10 To prove a prima facie case under Section 727(a)(3), the UST
11 must show (1) that the debtor did not maintain or preserve adequate
12 records, and (2) that such failure makes it impossible to ascertain
13 the debtor's financial condition and material business
14 transactions. *Lansdowne v. Cox (In re Cox)*, 41 F.3d 1294, 1296
15 (9th Cir. 1994). Section 727(a)(3) does not prescribe any
16 particular form of record-keeping, but "simply requires that the
17 bankrupt present sufficient written evidence which will enable his
18 creditors reasonably to ascertain his present financial condition
19 and to follow his business transactions for a reasonable period in
20 the past." *Rhoades v. Wickle*, 453 F.2d 51, 53 (9th Cir. 1971). The
21 records must have been contemporaneously maintained and
22 sufficiently complete and organized to allow the plaintiff to trace
23 the flow of the debtor's assets. See *In re Strbac*, 235 B.R. 880,
24 885 (6th Cir. BAP 1999). Creditors are not required to "sift
25 through documents and attempt to reconstruct the flow of the
26 debtor's assets." *Matter of Juzwiak*, 89 F.3d 424, 429 (7th Cir.
27 1996). Once the plaintiff shows that the debtor's records are
28 insufficient to ascertain the debtor's financial condition and

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1 business transactions, the burden of coming forward shifts to the
2 debtor to produce " 'additional credible evidence to rebut the
3 proof of insufficient records, or to justify the absence of
4 records.'" *Nemes*, 323 B.R. at 325 (citation omitted). See also
5 *Cox*, 41 F.3d at 1296. To determine whether the debtor is justified
6 in failing to maintain adequate records, courts consider what a
7 "normal, reasonable person should do under similar circumstances."
8 *Meridian Bank v. Alten*, 958 F.2d 1226, 1231 (3rd Cir. 1992)
9 (citation omitted). Factors to be considered by the court include
10 the debtor's education, experience, and sophistication; the volume
11 and complexity of the debtor's business; the amount of credit
12 extended to the debtor; and any other relevant circumstances. *Id.*
13 at 1232. Notably, the debtor's intent to conceal her assets or
14 financial condition is not an element of Section 727(a)(3). *In re*
15 *Bourgeut*, 176 B.R. 25, 28 (Bankr. C.D. Cal. 1994).

16 Defendant admitted that she converted trust funds from her
17 business, Exceptional Escrow, and that she spent the Petition Date
18 Funds, the Prepetition Insurance Payment and the Postpetition
19 Insurance Payment. Exhibit P-27 explains only where some of the
20 money went. Defendant failed to present any documentation
21 concerning the foregoing funds which were at one point in her
22 possession. Defendant's true financial condition had to be
23 painstakingly pieced together by the UST from sources other than
24 documentation and information provided by Defendant. Accordingly,
25 Defendant's discharge may be denied under Section 727(a)(3).

26 E. Denial of Discharge Under Section 727(a)(4).

27 The UST contends that Defendant's discharge should be denied
28 pursuant to Section 727(a)(4) because she acted knowingly and

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1 fraudulently when she made false oaths regarding her assets. A
2 successful claim under this provision requires the plaintiff to
3 show: "(1) the debtor made a false oath in connection with the
4 case; (2) the oath related to a material fact; (3) the oath was
5 made knowingly; and (4) the oath was made fraudulently." *In re*
6 *Roberts*, 331 B.R. 876, 882 (9th Cir. BAP 2005). Mere carelessness
7 or recklessness will not suffice under the third element of this
8 standard, though "recklessness can be probative of fraudulent
9 intent." *In re Khalil*, 379 B.R. 163, 173 (9th Cir. BAP 2007);
10 *Roberts*, 331 B.R. at 883-84. Fraudulent intent may also be
11 inferred from cumulative falsehoods. *In re Hammeken*, 316 B.R. 723,
12 730 (Bankr. D.Ariz. 2004).

13 The UST contends that Defendant made false oaths regarding the
14 existence of the Petition Date Funds, the existence of the Horses,
15 the existence of the Vehicles, the existence of the Account
16 Receivable, the existence of the Wind Damage Claim, the Defendant's
17 receipt of the Prepetition Insurance Payment, the Defendant's
18 entitlement or expectation to receipt of the Postpetition Insurance
19 Payment, the Refinance, the Defendant's receipt of the Refinance
20 Proceeds, the existence of the Prepetition Litigation, the
21 repossession of the Bayliner, the Defendant's receipt of the Trust
22 Account Funds, the identity of the Trust Account Creditors, and
23 Defendant's interest in the Jewelry.

24 Defendant contends that the above-described omissions were not
25 material. A fact is material "if it bears a relationship to the
26 bankrupt's business transactions or estate, or concerns the
27 discovery of assets, business dealings, or the existence and
28 disposition of his property." *In re Khalil*, 379 B.R. 163, 173

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1 (Bankr. 9th Cir. 2007). In *In re Maring*, 2008 WL 1780932 at 2 (W.D.
2 Wash. 2008), the court described the materiality prong as a "low
3 bar" for the plaintiff to meet. Quoting *Adeeb, supra*, the court
4 stated "Furthermore, "[t]he asset's value need not be 'material,'
5 nor must a debtor 'succeed in harming creditors to warrant denial
6 of discharge.'" Id. (quoting *In re Adeeb*, 787 F.2d 1339, 1343 (9th
7 Cir.1986)).

8 Defendant's cumulative omissions support a conclusion that
9 Defendant acted fraudulently in making false oaths regarding her
10 Initial Schedules and Initial SOFA. Defendant stated affirmatively
11 at the Section 341 meeting that her Initial Schedules and SOFA were
12 true and accurate when she knew they were not. It was not until
13 after multiple depositions and significant investigation by the
14 UST's office that all of Defendant's omissions concerning her
15 financial condition were discovered.

16 Courts have recognized that failure to read the schedules is
17 not a defense to a dischargeability action under Section
18 727(a)(4)(A). See, e.g., *In re Leija*, 270 B.R. 497, 503 (Bankr.
19 E.D. Cal. 2001). Accord *Boroff v. Tully (In re Tully)*, 818 F.2d
20 106, 111 (1st Cir. 1987)("A debtor cannot, merely by playing
21 ostrich and burying his head deeply enough in the sand, disclaim
22 all responsibility for statements which he has made under oath.").
23 See also *In re Downey*, 245 B.R. 5, 15 (Bankr. D. Idaho
24 1999)("[A]ttorney error does not absolve a debtor, who signs the
25 petition and schedules under penalty of perjury, from the duty to
26 ensure that information is accurate and complete to the best of his
27 knowledge.").

1 Defendant is a sophisticated business person who, in
2 connection with her escrow business, dealt directly with oaths.
3 She should have reviewed the Initial Schedules and Initial SOFA
4 carefully and corrected misstatements. At her Section 341 meeting,
5 she had the chance to correct errors and omissions and failed to do
6 so.

7 For the foregoing reasons, I conclude that the UST has met its
8 burden under Section 727(a)(4).

9 F. Denial of Discharge Under Section 727(a)(5).

10 The UST initially sought to deny Defendant's discharge under
11 Section 727(a)(5) on the ground that she failed to satisfactorily
12 account for substantial funds, including, without limitation, the
13 Petition Date Funds, the Postpetition Insurance Payment, and the
14 Trust Account Funds. In its reply brief, however, the UST stated
15 that it would pursue this claim only with regard to the Trust
16 Account Funds. I agree that Defendant has failed to account for
17 these funds. Her testimony was merely that she took the Trust
18 Account Funds and put them in the general business account for
19 Exceptional Escrow. She provided no documentation of this
20 transaction, however, claiming that she did not have access to the
21 company books and records in the possession of the Washington State
22 Department of Financial Institutions. It was Defendant's burden to
23 produce this evidence. There is no evidence that she even
24 requested the documents from the Department of Financial
25 Institutions. Accordingly, I find that the UST has met its burden
26 under Section 727(a)(5).

1 G. Denial of Discharge Under Section 727(a)(6).

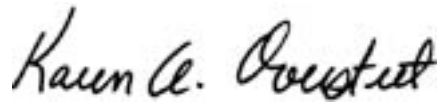
2 Finally, the UST requests the Court to deny Defendant's
3 discharge pursuant Section 727(a)(6) on the ground that Defendant
4 has refused to obey the Turnover Order which required her to
5 deliver certain funds to the Trustee, including proceeds of an
6 insurance claim which she received after the petition date.

7 Given my rulings above that Defendant's discharge should be
8 denied on numerous other grounds, it is not necessary for me to
9 resolve the question of whether willful and intentional
10 disobedience is required to sustain an action under Section
11 727(a)(6). *See, e.g., In Re of Jarrell*, 129 B.R. 29 (Bkrtcy. Del.
12 1991)(denial of discharge based upon refusal to comply with a court
13 order requires willful and intentional disobedience); *In re Walter*,
14 265 B.R. 753 (Bkrtcy. D. Ohio, 2001)(discussing the difference
15 between a refusal and a failure to comply with a court order); *But*
16 *see United States v. Richardson (In re Richardson)*, 85 B.R. 1008,
17 1011 (Bankr. W.D. Mo. 1988)(use of the word "refused" in
18 § 727(a)(6) denotes that an action brought under this section
19 should, in substance, simply be treated as a civil contempt
20 proceeding, thereby implicitly negating the intent requirement from
21 the word "refused" as willfulness is not an element to a proceeding
22 in civil contempt); *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d
23 716, 720 (6th Cir. 1996) (stating "willfulness is not an element of
24 civil contempt, so the intent of a party to disobey a court order
25 is irrelevant to the validity of a contempt finding.")).
26 Accordingly, the UST's claim under Section 727(a)(6) will be
27 dismissed as moot.

1 **Conclusion**

2 Based upon the foregoing findings of fact and conclusions of
3 law, the Court finds that the UST has met its burden of proving
4 that Defendant's discharge should be denied under Sections
5 727(a)(2), (a)(3), (a)(4) and (a)(5). The Court further finds that
6 the UST's claim under Section 727(a)(6) should be dismissed as
7 moot. The UST is instructed to prepare an order in conformance
8 with this Memorandum Decision.

9 DATED this 17th day of July, 2008

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11
12 KAREN A. OVERSTREET
13 UNITED STATES BANKRUPTCY JUDGE
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